IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. THOMAS MICHAEL JAMES, Petitioner.	2 CA-CR 2009-0129-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20003697

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Thomas Michael James
Buckeye
In Propria Persona

V Á S Q U E Z, Judge.

¶1 Petitioner Thomas James apparently seeks review of the trial court's summary dismissals of his second and third notices of post-conviction relief. James was convicted after a jury trial of second-degree murder and sentenced to an aggravated prison term of nineteen years. We affirmed his conviction and sentence on appeal. *State v. James*, No. 2 CA-CR 2002-0135 (memorandum decision filed Sept. 18, 2003).

¶2 In May 2004, James filed his first notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court granted his motion to proceed in propria persona and appointed advisory counsel to assist him. After reviewing James's petition, the court found James had stated one colorable claim and held an evidentiary hearing limited to the issue of whether trial counsel had been ineffective in failing to present a justification defense. The court then denied relief on all claims he had raised, and James petitioned for review. We reviewed the court's ruling, found no abuse of discretion, and also denied relief. *State v. James*, No. 2 CA-CR 2006-0246-PR (memorandum decision filed Jan. 31, 2007).

¶3 In December 2008, James filed a successive notice of post-conviction relief and, at the same time, a petition. The trial court summarily dismissed James's second proceeding, finding all of James's claims were precluded. In denying James's subsequent motion for rehearing, the court observed James had "fail[ed] to address the reason for summary dismissal—that his Notice and premature Petition both failed to state a specific exception to preclusion and meritorious reasons for not having raised his claims in his first post-conviction relief proceeding."

¶4 James requested and was granted extensions of time to file a pro se petition for review of the trial court's decision in his second Rule 32 proceeding, and he filed his petition for review in this court in July 2009. But in June 2009, James also had filed a third pro se notice of and petition for post-conviction relief. The court summarily dismissed James's third notice on July 7, 2009, again finding James had "failed to state meritorious reasons to substantiate his claims for an exception to preclusion as required by Rule 32.2(b), Ariz. R. Crim. P." Although James did not include the court's July ruling in his petition for review as required by Rule 32.9(c)(1)(i), he does include the order in an appendix and refers on review to issues raised in his third post-conviction relief proceeding. In our discretion, we will therefore review the court's dismissal of James's third notice of post-conviction relief as well as the court's dismissal and denial of rehearing in his second Rule 32 proceeding.

¶5 In James's second Rule 32 petition, he appears to have alleged the state (1) lacked probable cause or relied on falsified information to issue a warrant for his arrest, (2) lacked authority to take custody of his four-year-old daughter or question her, (3) violated his due process rights by failing to notify him before allegedly destroying any affidavit in support of any arrest warrant that once may have existed, (4) failed to disclose exculpatory evidence, and (5) engaged in prosecutorial misconduct by (a) offering or failing to correct perjured or materially misleading testimony before the grand jury and (b) failing to inform the grand jury of his request to appear and testify. He further alleged that his trial counsel were ineffective in failing to address these issues adequately, and that the trial court abused

its discretion in denying (1) his pretrial motion to remand his case to the grand jury and (2) his request to present additional witnesses at the evidentiary hearing in his first Rule 32 proceeding. He also alleged the Pima County Sheriff's Department (PCSD) attempted to conceal its officers' misconduct by finding unfounded a complaint James had made against them. James maintained his claims were excepted from preclusion because they arose from newly discovered material facts, *see* Ariz. R. Crim. P. 32.1(e), 32.2(b), relying on an affidavit of Laura Quackenbush, an employee of the Pima County Public Defender's office. In her March 2007 affidavit, Quackenbush averred she had been unable to locate an affidavit of probable cause in support of James's 2000 arrest warrant in the superior court file or PCSD records. She also stated that, pursuant to its record retention schedule, the Pima County Justice Court would have retained James's felony arrest warrant record for only six months.

¶6 In James's third notice and petition for post-conviction relief, filed in June 2009, he re-urged all of the arguments he had made in his second petition. He also asserted new claims of ineffective assistance of trial counsel and prosecutorial misconduct, arguing the state and his trial counsel had been "in league" to prevent him from testifying before the grand jury and at trial and had concealed file documents from him. Citing Rule 32.1(e), he relied on another affidavit from Quackenbush to argue his claims were not precluded because they were based on newly discovered material facts that likely would have changed the verdict. *See* Ariz. R. Crim. P. 32.2(b) (preclusive effect of "Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h)"). In Quackenbush's May 2009

affidavit, she stated she had located letters written by a private attorney in November 2000 that pertained to James's request to appear before the grand jury. James also argued his claims were not precluded because this and other affidavits he filed in previous proceedings established his "actual innocen[ce]," apparently relying on Rule 32.1(h). Finally, he maintained his claims were not precluded because his conviction and sentence had been a "miscarriage of justice" based on "outrageous government conduct."

¶7 As in his motion for rehearing in his second Rule 32 proceeding, most of James's arguments on review are directed to the merits of his claims for relief rather than the trial court's rulings that his claims were precluded. Because our review is limited to "issues which were decided by the trial court," *see* Ariz. R. Crim. P. 32.9, we limit our review to the court's rulings that all of the claims James raised in his second and third post-conviction relief proceedings were subject to preclusion. We will not disturb a court's denial of post-conviction relief absent an abuse of discretion. *See State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). We find no abuse of discretion here.

¶8 To the extent James addresses the preclusion of his claims, he first contends "his conviction and sentence [are] in violation of [the] U[nited] S[tates] and Ariz[ona] Const[itutions]," and his claims are therefore "of sufficient constitutional magnitude" that they may not be deemed waived by his failure to raise them on appeal or in his previous post-conviction proceedings. *See* Ariz. R. Crim. P. 32.2(a)(3) cmt.; *Stewart v. Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d 1067, 1071 (2002). Because James did not raise this argument in

his post-conviction relief proceedings below, we will not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues in petition for review that "have obviously never been presented to the trial court for its consideration").[1]

¶9 James appears also to challenge the trial court's determination that he failed to establish an exception to preclusion under Rule 32.1(e). According to James, Quackenbush's affidavits constitute "newly discovered evidence" of due process violations and ineffective assistance of trial counsel. But the trial court did not abuse its discretion in finding James had failed to state a colorable claim of "newly discovered material facts" that "probably would have changed the verdict" as required by Rule 32.1(e). As the court observed,

> The fact that [Quackenbush] could not locate an affidavit does not constitute newly discovered evidence which would change the verdict or sentence. It merely indicates that, in March 2007, she could not find an affidavit in connection with an arrest that occurred seven years earlier. Moreover, an affidavit that purports to establish probable cause for an arrest would not negate a petit jury verdict of guilt beyond a reasonable doubt on

[1]We pause to comment, however, that we have rejected a similar argument in *State v. Swoopes*, 216 Ariz. 390, ¶ 28, 166 P.3d 945, 954 (App. 2007). In *Swoopes*, we recognized our supreme court's distinction between claims involving "a right 'of sufficient constitutional magnitude to require personal waiver by the defendant,'" and "'most claims of trial error,'" which will be deemed waived, and therefore precluded, by the failure of a defendant or his counsel to raise the alleged error at trial, on appeal, or in a previous collateral proceeding. *Id.* ¶¶ 22, 26, *quoting Smith*, 202 Ariz. 446, ¶¶ 8, 12, 46 P.3d at 1070-71. But we made clear that "[a]n alleged violation of the general due process right of every defendant to a fair trial, without more, does not save [a] belated claim from preclusion." *Id.* ¶ 28.

> the substantive charge for which Petitioner was arrested pursuant to the affidavit.

¶10 Similarly, Quackenbush's discovery of correspondence asking that the grand jury be informed of James's interest in appearing does not constitute "new evidence" of any error in the grand jury proceedings or related claims of ineffective assistance of counsel. "Evidence is not newly discovered" for the purpose of Rule 32.1(e) "unless . . . at the time of trial . . . neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13, 4 P.3d 1030, 1033 (App. 2000). Contrary to James's assertions below, the existence of the correspondence was never in question, and the circumstances surrounding the state's receipt of the letter appear to have been fully litigated in a February 2001 hearing on James's motion to remand.[2] Any claim of grand jury error that may have been cognizable on direct appeal was waived by James's failure to raise the claim then. *Cf. State v. Moody*, 208 Ariz. 424, ¶ 31, 94 P.3d 1119, 1134-35 (2004) (grand jury findings generally not reviewable on appeal after conviction). And any claim that trial counsel had been ineffective with respect to grand jury proceedings

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[2]In summary, private attorney Robert Bonn averred he had hand-delivered drafts of letters written on James's behalf to James's appointed counsel, Assistant Public Defender Leo Plowman, the day before the scheduled grand jury hearing. According to a motion for remand prepared by Plowman, he "sent [the] letter[s] to the County Attorney on the morning of November 14, 2000," and "[s]ome time during that day, the Grand Jury convened and indicted . . . James of one Count of First Degree Murder." In response to the remand motion, the state filed the affidavit of Pima County Deputy Attorney Rick Unklesbay, who averred he did not receive the letters from Plowman until November 15, 2000, after the grand jury had indicted James. After hearing argument by counsel, the trial court denied James's motion for remand.

was waived by James's failure to raise it in his first Rule 32 proceeding, in which he had alleged ineffective assistance of trial and appellate counsel. *See Smith*, 202 Ariz. 446, ¶ 12, 46 P.3d at 1071 ("trial court need not examine the facts" of successive claim of ineffective assistance of counsel; "[t]he ground of ineffective assistance of counsel cannot be raised repeatedly").[3]

¶11 Finally, James suggests on review that his claims are excepted from preclusion because they are based on "a significant change in the law" pursuant to Rule 32.1(g). According to James, recent amendments to A.R.S. § 13-205, pertaining to the burden of proof when a defendant claims his use of force was justified, should apply retroactively to James's 2001 jury trial. Because James did not raise this claim in the trial court, we will not address it here.[4] *See* ¶ 8, *supra*.

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[3]James has offered no reason Quackenbush's affidavits would constitute "newly discovered material facts" relevant to his other claims of error. As the trial court found, those claims have either already been addressed on the merits or waived by James's failure to raise them in previous proceedings. Similarly, James does not directly challenge the court's ruling that he failed to establish an exception to preclusion pursuant to Rule 32.1(h), which requires clear and convincing evidence that, but for the errors alleged, "no reasonable fact-finder would have found [him] guilty of the underlying offense beyond a reasonable doubt." To the extent James's petition for review might be read to implicitly challenge the court's ruling on his claim of "actual innocence" pursuant to Rule 32.1(h), we find no abuse of discretion.

[4]In any event, this argument appears to be foreclosed by our supreme court's decision in *Garcia v. Browning*, 214 Ariz. 250, ¶¶ 19-20, 151 P.3d 533, 537 (2007), that retroactive application of the amended statute required an express provision by the legislature, as well as the legislature's subsequent amendment limiting retroactive application of the 2006 amendment to "all cases . . . that, as of April 24, 2006, had not been submitted to the fact finder to render a verdict," 2009 Ariz. Sess. Laws, ch. 190, § 1.

¶12 In sum, James has not satisfied his burden of showing the trial court abused its discretion in finding his claims precluded. Accordingly, although we grant review, we deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge